IN THE

Supreme Court of the United States

October Term, 1978

No. 78-602

TUSCAN DAIRY FARMS, INC.,
Petitioner-Appellant,

against

J. ROGER BARBER, As Commissioner of Agriculture and Markets of the State of New York,
Respondent-Appellee.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS.

OBJECTION TO MOTION BY THE GREAT ATLANTIC & PACIFIC TEA CO., INC., FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

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Pursuant to Rule 42(3) of the Rules of the Supreme Court of the United States, the respondent-appellee objects to the filing of a brief *amicus curiae* by The Great Atlantic & Pacific Tea Co., Inc. (hereinafter referred to as "A & P"), on the grounds that A & P has not set forth any facts or questions of law, relevant to the disposition of this case, which have not

been presented adequately by the parties in the courts below, nor any reason for believing that such issues and question will not be adequately presented by the parties in this Court.

Statement

The appellee refused A & P's request for consent to the filing of an *amicus curiae* brief because it is clear that the issue involved herein will be adequately presented by the parties. The appellant, Tuscan Dairy Farms, Inc. (hereinafter referred to as "appellant" or "Tuscan"), skillfully and exhaustively presented every aspect of this case in the New York courts. A & P has not demonstrated, or even alleged, that the issue herein has not been adequately presented. It has not raised new questions of law nor any new facts relevant to the disposition of this appeal.

ARGUMENT

I.

A & P has not demonstrated that it would present relevant facts or issues of law which have not already been adequately presented by the parties; therefore, its motion to file an *amicus curiae* brief should be denied.

A & P adopts the appellant's statement of the case (2).* It then proceeds to reargue the appellant's position without adding any significant new dimensions to the appellant's presentation on the issue before the Court. The same cases relied upon by the appellant are cited as A & P merely rephrases the argument already set forth by Tuscan.** The few additional cases cited by A & P do not present unraised issues, or they have no relevancy to the matter now before the Court.

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* Numbers in parenthesis refer to pages in A & P's motion or brief.

** The appellee's reply to the appellant's argument is set forth in the Motion to Dismiss Appeal, and to avoid repetition is not repeated herein.

A & P attempts to bolster the appellant's arguments by its inaccurate claim that the New York Court of Appeals views Agriculture and Markets Law § 258-c as aimed at protecting milk dealers from competition (8). In the case relied upon, however, the Court, in fact, recognized and emphasized the "overriding legislative purpose to prevent destructive competition" and to maintain "a healthy competitive atmosphere in the milk industry." *Dairylea v. Walkley*, 38 NY2d 6, 11-12, 339 NE2d 865, 869, 377 NYS2d 451, 456 (1975). And in the matter presently before the Court, the New York Court of Appeals explicitly found that the denial, pursuant to Agriculture and Markets Law § 258-c, of Tuscan's application for extension of its New York milk dealer's license to sell and distribute consumer-size packaged milk in Richmond County "did not have as its objective the economic protection of the milk industry of New York State, or even that of the County of Richmond." *Tuscan Dairy Farms v. Barber*, 45 NY2d 215, 225 (1978). Rather, the appellee's determination, under the statute, was found to serve the legitimate public interest purpose of maintaining a balanced milk distribution structure for the protection of the welfare of the consuming public. *Id.* at 225-226, 230.

A & P cites another New York case in its further attempt to show Agriculture and Markets Law § 258-c is aimed at protecting New York milk dealers (8). However, in the case relied upon, the Appellate Division of the New York Supreme Court explicitly recognized that the destructive competition provision is not for the purpose of advancing the interests of current licensees, but rather is aimed at protecting the public interest by assuring an adequate supply and service to meet the milk needs of the consuming public. *Friendship Dairies, Inc. v. Du Mond*, 284 App. Div. 147, 153, 155; 131 NYS2d 51, 56, 58 (3d Dep't, 1954).

U. S. v. Aluminum Company of America, 148 F2d 416 (2d Cir. 1945), cited by A & P (9), has no bearing whatsoever on this case. A & P's bare allegation that extant competitors maintain excess capacity to bar new licensees is totally unsupported. There is absolutely no evidence in the Tuscan record that capacity was expanded to prevent new entrants or to cover inefficiency. It was shown that two milk dealers had recently closed their processing plants, and the proprietor of one of the plants gave as the reason for closing the fact that volume was insufficient for efficient operations. (*Tuscan* Record in Court of Appeals, p. A121) Findings based on the A & P hearing have not been made. However, while the record contains testimony that some dealers modernized or expanded their plant facilities, A & P cites no evidence which would even indicate that such activity was to create excess capacity. There was testimony that expansion and modernization were undertaken in order to remain efficient and to handle existing production more efficiently. (A & P hearing transcript I, pp. 121, 197, 198)

A & P's claim that "excess capacity" has usually been the basis for denial of a milk dealer license application is also without any basis in fact. While capacity may be a factor to be considered in determining the ability of existing dealers to serve an area and in determining the impact of granting a particular license or license extension, there are many other factors to be taken into account. Thus, the total market conditions and potential impact of granting a license extension were fully evaluated in Tuscan, as well as in the cases cited by A & P (8, footnote).

II.

A & P's allegations of burdensome procedural delays in the State's administrative and judicial process have no support in the record and are contrary to fact.

In addition to rearguing Tuscan's position, A & P also makes the wholly unsupported allegation that many prospective milk dealer licensees have experienced "protracted and burdensome hearings" and conjectures that there are "potential out-of-state licensees who may be discouraged from filing a license application" (2).

The vast majority of hearings to consider applications for milk dealer licenses, or extensions thereof, are commenced and concluded in one day. The hearing to consider the appellant's application was concluded in one day. (Tuscan did request and was granted an additional hearing session, but subsequently notified the Department that it had no further evidence to present.)

The duration of the A & P hearing is not at all typical of a milk dealer licensing hearing. In fact, it is unique. A & P chose to present voluminous evidence, calling three witnesses who testified at length over a period of five days. A & P also conducted extensive cross-examination of witnesses called by the Department or other participants. At the Tuscan hearing nine Department witnesses testified, and the hearing was still concluded in one day.

The period of time over which the A & P hearing took place is also most unusual. The Department was prepared in June, 1977, to schedule a hearing to consider A & P's application. Following discussions with A & P's representative, the hearing date was set for September, rather than August, to accommodate A & P's schedules. In September, the department agreed to postpone the hearing to October 5. The October date

was subsequently adjourned to November, at the request of A & P. The hearing was commenced in November and scheduled to resume on an agreed upon date in December. However, due to conflicts in the schedule of A & P representatives, the December date for continuing the hearing was postponed until January, 1978. The remaining hearing sessions were scheduled on dates mutually agreeable to the parties. Thus, if the hearing was protracted, it was not because of the statute, on its face or in its application, but due to A & P's own delay.

Similarly, A & P's complaint concerning the time taken for judicial review of the Tuscan determination by the Appellate Division of the New York Supreme Court is totally without merit (13). While Tuscan commenced its proceeding for judicial review in June, 1976, it did not file and serve the record and its brief until March 25, 1977. Thereafter, the appellee-Commissioner promptly filed his brief, and the matter was argued before the Appellate Division on May 24, 1977. Thus, here again it is obvious that the delay referred by by A & P was not occasioned by the statute or the application of the statute, but rather by the applicant itself. It is also clear that the alleged delays claimed by A & P have no relevance to the disposition of the matter before the Court.

A & P's further allegation that potential out-of-state licensees may be discouraged from filing an application is so vague and speculative as to be totally meaningless. A & P has not cited one dealer who has been allegedly so discouraged. It is important to note again that Tuscan reviewed Department records at great length in its effort to support its original allegation that out-of-state dealers were discriminated against in the administration of Agriculture and Markets Law § 258-c (See p. 8 of Motion to Dismiss Appeal). Following extensive examination of Department records by its attorneys, however, the appellant abandoned this claim. *Id.* In fact,

there are many milk dealers from other states who are licensed as New York milk dealers, including the appellant itself which has been licensed in New York for over 20 years. (*Tuscan* Record in Court of Appeals, p. A29)

As demonstrated above, it is clear that A & P has not set forth additional questions of law or facts relevant to the disposition of this case, and has not shown, or even alleged, that there will be other than adequate presentation of the issues by the parties.

Conclusion

For the foregoing reasons, A & P's Motion for Leave to File a brief *amicus curiae* should be denied, and its submitted brief should not be considered by the Court.

Dated: November 17, 1978, Albany, New York.

Respectfully submitted,

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